

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>MARC ZACCARIA</b>	:	DETERMINATION
	:	DTA NO. 819994
for Revision of a Determination or for Refund of	:	
Cigarette Tax under Article 20 of the Tax Law for the	:	
Period November 6, 2003.	:	

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Petitioner, Marc Zaccaria, 204 Broad Street, Danielson, Connecticut 06239, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period November 6, 2003.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on March 15, 2005 at 10:30 A.M. and was continued to conclusion at the same location on November 16, 2005 at 1:30 P.M. The final brief in this matter was due by January 24, 2006, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by Allan B. Cruikshank, Jr., Esq. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Michelle M. Helm, Esq., of counsel).

***ISSUE***

Whether petitioner was in possession of or had control of unstamped cigarettes and, as such, is liable for the penalty imposed pursuant to Tax Law § 481(1)(b)(i).

***FINDINGS OF FACT***

1. On November 6, 2003, at approximately 1:55 P.M., while patrolling in a marked United States Border Patrol vehicle on New York State Route 37 on the Akwesasne Mohawk Territory in Northern New York State, Border Patrol Agent Gilbert Gonzales observed petitioner, Marc Zaccaria, driving a 2000 black Lincoln automobile bearing Connecticut license plates. This section of Route 37 is known to law enforcement personnel as a “smuggling pipeline” between the East Coast and the Akwesasne Reservation. Border Patrol Agent Gonzales followed petitioner in his vehicle to the nearby village of Fort Covington, New York. After petitioner parked and exited his car near the Village Mart Store in Fort Covington, Border Patrol Agent Gonzales approached petitioner. The border patrol agent first asked petitioner his citizenship status (he answered that he was a United States citizen) and then asked petitioner if he could look in the trunk of his vehicle. Petitioner responded that the car was not his and that he did not know what was in the trunk. He also expressly consented to the agent’s looking in the trunk.

2. Upon opening the trunk with the key the border patrol agent observed several hundred cartons of Marlboro brand cigarettes. The cigarettes were tightly packed such that few, if any, more cigarettes could be packed in the truck and they were packed in such a way as to maximize the number of cartons that could be placed in the trunk.

3. Investigators William J. Soldato and Barbara A. Paye of the Division of Taxation’s (“Division”) Petroleum, Alcohol & Tobacco Bureau arrived on the scene in Fort Covington shortly after Border Patrol Agent Gonzales opened the trunk of the vehicle and observed the cartons of cigarettes tightly packed in the trunk of the 2000 black Lincoln.

4. The cartons were later counted by Division investigators, including Investigator Soldato, and it was determined that there were 300.1 cartons of cigarettes in the vehicle at the time the border patrol agent opened the trunk. None of the packages of cigarettes in the trunk bore tax stamps.

5. Petitioner was taken into custody by investigators Soldato and Paye. While in custody, petitioner stated that the vehicle in question was owned by his employer and that he was in the area to do an estimate for a carpet installation for a local business. Petitioner stated that he had been at the location of the local business for about two hours on November 6th completing the estimate. Petitioner did not know the name of the business or the name of the owner of the business and did not have any paperwork or invoices from the estimate. Petitioner told the investigators that his employer had a copy of the estimate in a separate car, but that his employer had already left to return to Connecticut. Petitioner also told the investigators that he had stayed in a local hotel the night before (November 5, 2003), but he could not remember the name of the hotel or where it was located.

6. The vehicle in question, the 2000 black Lincoln, was registered to Leonard J. Durango, 204 Broad Street, Danielson, Connecticut. The address given on the registration is identical to petitioner's home address.

7. Petitioner was charged with felony possession of untaxed cigarettes in violation of Tax Law § 1814(e)(2). Such charge remained pending as of the conclusion of the hearing in this matter.

8. On February 23, 2004, the Division of Taxation issued to petitioner, Marc Zaccaria, a Notice of Determination which asserted penalty of \$44,265.00 due. The notice advised

petitioner that, “on 11/06/03, you were found to be in possession of unstamped or unlawfully stamped cigarettes, and/or untaxed tobacco products.

“Therefore, penalty is imposed under Article 20 of the New York State Tax Law.”

9. The penalty assessed against petitioner was calculated by taking the 300.1 cartons of cigarettes, subtracting 5 cartons allowable for personal use, and multiplying the remaining 295.1 cartons by \$150.00 per carton, for a total penalty due of \$44,265.00.

10. The arrest report of investigators Soldato and Paye indicates that an inventory of the Lincoln vehicle found 100.1 cartons of cigarettes. The report of Border Patrol Agent Gonzales and a New York State Police Vehicle Impoundment and Inventory Record both refer to 301 cartons of cigarettes in the vehicle. Investigator Soldato testified at the hearing that he counted 300.1 cartons of cigarettes in the trunk of the vehicle following its seizure.

11. Petitioner submitted the affidavit of Isidro William Joseph Kelly dated November 25, 2003. Mr. Kelly’s affidavit indicated that he is a Long Island, New York resident and that on November 3, 2003 he purchased approximately 300 cartons of cigarettes from an unidentified Indian reservation located on Long Island; that he placed such cigarettes in his work truck and drove to meet petitioner, a co-worker, in upper New York State to appraise a job on November 6, 2003; that he transferred the cigarettes into the Lincoln because he had to pick up supplies for a different job; that petitioner did not know that the cigarettes were in the trunk of the Lincoln; that he informed petitioner that he would call him to exchange vehicles at a location nearer to the building supply company; that he intended to return to Long Island with the Lincoln and the cartons of cigarettes, but that the exchange of vehicles never took place.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 471 imposes a tax on all cigarettes possessed in New York State for purposes of sale. Although it is the intent of the law that the ultimate incidence of the cigarette tax will fall upon the consumer, the tax is paid by licensed cigarette agents who purchase cigarette tax stamps from the Division's designated bank and affix such stamps on individual packages of cigarettes as evidence of payment (*see*, 20 NYCRR 74.1[b]). All cigarettes within the State are presumed subject to tax under Tax Law § 471 until the contrary is established (*see*, Tax Law § 471[1]).

B. Tax Law § 481(1)(b)(i) provides, in pertinent part, as follows:

In addition to any other penalty imposed by this article, the commissioner may impose a penalty of not more than one hundred fifty dollars for each two hundred cigarettes, or fraction thereof, in excess of one thousand cigarettes in unstamped or unlawfully stamped packages in the possession or under the control of any person.

C. Petitioner does not contest the fact that he was driving a vehicle with a large number of unstamped cigarettes in the trunk at the time he was approached by Border Patrol Agent Gonzales. It would thus appear clear that petitioner was in possession or control of such unstamped cigarettes and was thus properly subject to penalties imposed pursuant to Tax Law § 481(1)(b)(i) (*see, Matter of Jiang*, Tax Appeals Tribunal, March 31, 2005). Petitioner contends, however, that Tax Law § 481(1)(b)(i) requires that possession be knowing and willful and that he was unaware that cigarettes were in the trunk of the car he was driving. According to petitioner, then, he was not properly subject to the penalties imposed herein.

Petitioner's contention is rejected, as he has failed to sustain his burden of proof to show that he did not know the cigarettes were in the trunk (*see*, 20 NYCRR 3000.15[d][5]; *Matter of Jiang, supra*). In support of his position, petitioner notes his statements at the time of his arrest

to the border patrol agent and to the Division investigators that the cigarettes were not his. Considering the circumstances under which the statements were made, i.e., petitioner had been apprehended by law enforcement with a trunk full of contraband and was facing arrest, and given the absence of any corroborating testimony in the record, these unsworn statements are unconvincing. Petitioner also cites the affidavit of Isidro Kelly in support of his position (*see*, Finding of Fact “10”). This evidence, too, is properly given little weight. As an affidavit, the statements made therein were not subject to cross-examination, and Mr. Kelly’s credibility could not be assessed, despite the fact that the factual claims in Mr. Kelly’s affidavit are implausible on their face,<sup>1</sup> and yet the credibility of such claims is crucial to petitioner’s case (*see, Matter of Orvis Co. v. Tax Appeals Tribunal*, 86 NY2d 165, 180, 630 NYS2d 680, 687).

Additionally, it is noted that petitioner offered no testimony at hearing. While petitioner’s reluctance to testify is understandable considering the pendency of criminal charges, certainly petitioner could have offered the testimony of Mr. Kelly or Leonard Durango, petitioner’s purported employer and his apparent roommate (*see*, Finding of Fact “6”), in support of his position.

D. Petitioner contends that the 24-hour grace period set forth in Tax Law § 471-a defeats the subject penalty assessment. Pursuant to that section, a use tax is imposed on the use within New York of unstamped cigarettes. A taxpayer has 24 hours after liability for tax accrues to file a return and to pay the use tax. Petitioner asserts that the record does not establish that the 24-

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<sup>1</sup> The affidavit asserts that a Long Island resident purchased 300 cartons of cigarettes from an Indian reservation on Long Island; traveled several hundred miles in his own vehicle while transporting the cigarettes in order to appraise a job (which happens to be in the vicinity of another Indian reservation); transferred those cigarettes into the trunk of a second vehicle, unbeknownst to the driver, a co-worker, who he arranged to meet later to exchange vehicles. This chain of events seems extremely unlikely. Further undermining the affidavit’s credibility is its failure to identify the Long Island Indian reservation and its failure to offer any explanation as why an exchange of vehicles would be necessary since Mr. Kelly was driving his own vehicle.

hour period had expired at the time the cigarettes were seized from the trunk of the Lincoln on November 6, 2003. According to petitioner, then, he was not subject to penalties under Tax Law § 481 since, pursuant to Tax Law § 471-a, he could still file and pay use tax.

Petitioner's contention is rejected because his possession of cigarettes in the instant matter was not subject to use tax under Tax Law § 471-a. For purposes of Article 20 of the Tax Law, the definition of "use" in Tax Law § 471-a specifically excludes "possession for sale" and the record in this matter establishes that petitioner's possession of cigarettes was, in fact, for sale. Specifically, petitioner was in possession of 300.1 cartons of unstamped cigarettes, an amount which reasonably gives rise to an inference that such possession was for sale. Indeed, Tax Law § 1814(f) provides that, for purposes of that section, possession of 5,000 or more cigarettes (25 cartons) is presumptive evidence of possession for sale. Moreover, the circumstances of his apprehension by law enforcement strongly suggest that petitioner was engaged in smuggling. Finally, it is noted that petitioner offered no evidence to show that his possession of the cigarettes in question was not for sale. Accordingly, since petitioner's possession of the cigarettes in question did not fall within the definition of "use" under Tax Law § 471-a, the cigarettes were not subject to use tax and the 24-hour grace period did not apply.

Petitioner asserts that *People v. Tracy* (1 Misc 3d 308, 764 NYS2d 585), is persuasive authority that the 24-hour grace period negates the imposition of penalty in the instant matter. In that case, the City Court of Watertown, New York dismissed a criminal information charging the defendant, who possessed 45 cartons of untaxed cigarettes, with an attempt to evade or defeat cigarette taxes pursuant to Tax Law § 1814(a)(1). The court found the information fatally defective because it failed to allege that the 24-hour period during which the defendant could have timely filed a use tax return and paid use tax under Tax Law § 471-a had expired. The

court reasoned that since the defendant could have timely paid the tax during the 24-hour period, he could not be charged with attempting to evade or defeat the tax until the 24-hour period had expired.

Contrary to petitioner's contention, *People v. Tracy* does not persuasively support his position in this matter. Key to this lack of persuasion is that the *Tracy* decision does not correctly apply the Tax Law. Specifically, the decision apparently overlooks that portion of Tax Law § 1814(f) which provides that, for purposes of that section, where a person possesses 5,000 or more cigarettes (as was the case in *Tracy*) "any provisions of Article 20 providing for a time period during . . . which a use tax may be paid on unstamped cigarettes [i.e., Tax Law § 471-a] . . . shall not apply" (emphasis added). Hence, the 24-hour grace period, upon which the rationale of the *Tracy* decision rests, is not applicable to that case.

Even if *Tracy* were correct, it would be distinguishable from the instant matter. Unlike the criminal matter at issue in *Tracy*, the instant matter involves civil penalties imposed administratively. Hence, the standard for the issuance of a statutory notice of determination, the document analogous to the criminal information in *Tracy*, is the rational basis standard (*see, e.g., Matter of Atlantic & Hudson Limited Partnership*, Tax Appeals Tribunal, January 30, 1992). Here, the circumstances of petitioner's apprehension by law enforcement clearly provide a rational basis to conclude that petitioner possessed the cigarettes in question for sale and was therefore properly subject to penalties under Tax Law § 481(1)(b)(i). Given such a rational basis, it became petitioner's burden to prove that the subject penalties were improperly imposed. As discussed previously, petitioner has failed to make such a showing.

E. Petitioner also contends that 100.1 cartons of cigarettes should be used as the basis for calculating any penalty due herein because the arrest report of investigators Soldato and Paye

indicates that 100.1 cartons of untaxed cigarettes were seized from the vehicle. This contention is also rejected. Investigator Soldato credibly testified that he counted 300.1 cartons of cigarettes in the trunk of the vehicle following its seizure. Also, the report of Border Patrol Agent Gonzales and a New York State Police Vehicle Impoundment and Inventory Record both refer to 301 cartons of cigarettes in the vehicle. Additionally, although not given credence in this determination, even the Kelly affidavit, submitted by petitioner in support of his position, refers to 300 cartons of cigarettes in the trunk of the Lincoln.

F. Petitioner also asserts, in the alternative, that the penalty imposed herein of \$150.00 per 200 cigarettes is excessive and that some lesser penalty is more appropriate in this case. Petitioner asserts that Mr. Kelly's involvement, as indicated by his affidavit, justifies an adjustment of the penalty.

As discussed previously, the Kelly affidavit is properly given little weight herein. Hence, petitioner has failed to establish the factual assertions contained in the affidavit. Petitioner has thus failed to demonstrate that the imposition of the penalty by the Division in the amount so imposed was an abuse of discretion (*see, Matter of Cano*, Tax Appeals Tribunal, December 12, 2002). Accordingly, no adjustment in the amount of the penalty imposed herein is warranted.

G. The petition of Marc Zaccaria is denied and the penalty asserted in the Notice of Determination, dated February 23, 2004, is sustained.

DATED: Troy, New York  
June 22, 2006

/s/ Timothy J. Alston  
ADMINISTRATIVE LAW JUDGE